STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 23, 2006
v	No. 260759 Manistee Circuit Court
OLIVER SCOTT WILLETT, Defendant-Appellant.	LC No. 04-003503-FC

Before: Sawyer, P.J., and Kelly and Davis, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to life imprisonment for the murder conviction and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the shooting death of his stepfather, Charlie LeMire. Defendant claimed that he shot LeMire in self-defense, and in defense of his mother.

Defendant first argues that the trial court violated his right to due process by allowing the jurors to submit questions for witnesses. Because defendant did not object to this procedure, or object to any of the questions submitted by the jurors, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In *People v Heard*, 388 Mich 182, 187; 200 NW2d 73 (1972), our Supreme Court held that "[t]he practice of permitting questions to witnesses propounded by jurors should rest in the sound discretion of the trial court." Here, defendant does not claim any abuse of discretion, or challenge any specific question that was asked, but argues that the practice of permitting jurors to ask questions should be deemed "structural error . . . as a matter of law reform." Because we are bound to follow our Supreme Court's decision in *Heard*, which holds that the practice is discretionary with the trial court, defendant has failed to show that the trial court plainly erred by allowing the jurors to ask questions.

Defendant next argues that trial counsel was ineffective for eliciting testimony from defendant about prior criminal acts that would not have been admissible for impeachment under MRE 609. Because defendant did not raise this issue in a motion for a new trial or *Ginther*[1] hearing, our review of this issue is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish a claim of ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment and that the deficient performance so prejudiced the defense as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *Id.*

At trial, defendant testified that the decedent walked toward the telephone and stated that he was going to call the police and that defendant would go to jail, whereupon defendant pulled the telephone from the wall. According to defendant, the decedent then obtained a gun and the situation escalated. Defense counsel asked defendant whether there was a possibility that he would go to jail if the decedent had actually called the police as he threatened, and defendant admitted that there was an extreme likelihood because he had three "outstanding warrants for unpaid fines," which defendant described as larceny from a building under $200, failure to report an accident, and domestic violence (involving a situation in which defendant was not the first aggressor and both participants were charged).

Defendant argues at length, and the prosecutor concedes, that this criminal history would not have been admissible for impeachment under MRE 609. But the information was never used to attack defendant's credibility at trial, the prosecutor never used the information in either cross-examination or closing argument, and, apart from MRE 609, defendant has not overcome the presumption that the information was elicited by defense counsel as a matter of trial strategy. Counsel may have wanted to enhance the credibility of defendant's explanation for why he removed the telephone before the shooting. Moreover, the jury was also instructed on the lesser offense of voluntary manslaughter, which occurs when a killing is committed in the heat of passion, and the information about defendant's criminal history provided some support for this theory by explaining why defendant reacted as he did when the decedent threatened to call the police. This Court will not assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Therefore, we reject this claim of error.

Defendant next argues that the trial court erred when it denied his motion for a mistrial after the prosecutor elicited information about his post-arrest silence. This Court reviews a trial court's decision denying a motion for a mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). "A motion for a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs the defendant's ability to get a fair trial." *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995).

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

When cross-examining defendant, the prosecutor elicited that defendant did not claim self-defense when he spoke to two civilian witnesses shortly after the shooting. The prosecutor also questioned defendant about whether he claimed self-defense after the police arrived, or while at the state police post. Defense counsel objected to the latter line of questioning. The matter was discussed outside the presence of the jury and the prosecutor conceded that the latter questions were improper. The trial court then denied defendant's motion for a mistrial, but gave the following cautionary instruction:

> Members of the Jury, there were questions by the prosecutor at the end of Friday that went to what the defendant had told investigating police officers as to what occurred. Members of the Jury, I am sustaining the defendant's objections to those questions and striking the defendant's answers. The prosecutor's questions to the defendant in that regard were improper. I charge you that the defendant's exercise of his constitutional right to remain silent cannot be used against him. His exercise of that right must not affect your verdict in any way.

It is well settled that a "defendant's right to due process guaranteed by the Fourteenth Amendment is violated where the prosecutor uses his postarrest, post-*Miranda*[2] warning silence for impeachment or as substantive evidence unless it is used to contradict the defendant's trial testimony that he made a statement, that he cooperated with police, or that trial was his first opportunity to explain his version of events." *People v Solmonson*, 261 Mich App 657, 664; 683 NW2d 761 (2004).

It is not clear from the record whether the prosecutor's questions were directed at the timeframe before or after defendant received *Miranda* warnings. But the prosecutor conceded below that the questions were improper. Nevertheless, the jury was given a cautionary instruction to disregard the prosecutor's questions and defendant's answers, and to not let defendant's exercise of his right to remain silent affect its verdict. Courts "normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant." *Greer v Miller*, 483 US 756, 767; 107 S Ct 3102; 97 L Ed 2d 618 (1987) (citations omitted).

In this case, the police officer on the scene testified that defendant's "demeanor was strange," and that he had "a blank stare." Evidence was presented without objection that defendant was unresponsive to police questioning and did not give the police his name. Defendant had already testified on direct examination that he "flat out" did not remember the first three or four days after the shooting. When the prosecutor asked defendant whether he told the police trooper on the scene that he shot the decedent in self-defense, defendant responded that he did not recall whether he spent any time with the officer and did not recall anything after the shooting. Defendant's answers were consistent with the other evidence at trial concerning defendant's demeanor and psychological state immediately after the shooting. None of the

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

prosecutor's questions involved silence in response to police questioning, and defendant's silence was not used in closing argument.

These circumstances do not suggest an overwhelming probability that the jury would not be able to follow the trial court's cautionary instruction or a strong likelihood that the effect of the improper questions were devastating to defendant. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Finally, defendant argues, in propria persona, that he was denied a fair trial because of the cumulative effect of many errors at trial, and because of errors during the police investigation. Only actual errors are reviewed for "cumulative unfair prejudice." *People v LeBlanc*, 465 Mich 575, 591-592 n 12; 640 NW2d 246 (2002). In this case, defendant has not shown that multiple errors actually occurred at trial. Further, defendant's claims that the police committed several errors during their investigation of the case do not establish a basis for relief. Neither the prosecutor nor the police have a duty to investigate on a defendant's behalf or to try to find exculpatory evidence. *People v Sawyer*, 222 Mich App 1, 6; 564 NW2d 62 (1997); *People v Burwick*, 450 Mich 281, 289 n 10; 537 NW2d 813 (1995).

Affirmed.

/s/ David H. Sawyer
/s/ Kirsten Frank Kelly
/s/ Alton T. Davis